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No. 94-1028

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

TINA MARIE SELLERS, by and through her guardian, natural mother and next friend, JOANN SELLERS, ALBERT DEUSER, and PHYLLIS MENKE,

Petitioners,

v.

ROBERT J. BAER, JOHN J. FRANK, JAMES E. MOSBACHER, WILLIAM E. YOUNG, as Members of the Board of Police Commissioners for the City of St. Louis and MAYOR VINCENT SCHOEMEHL, in his ex officio capacity, LAWRENCE J. KING, NATIONAL PARK RANGER DAVID VECERA, NATIONAL PARK RANGER EDWARD BRIDGES, CHIEF RANGER DENNIS BURNETT, and the UNITED STATES OF AMERICA,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF IN OPPOSITION OF RESPONDENTS ROBERT J. BAER, JOHN J. FRANK, JAMES E. MOSBACHER, WILLIAM E. YOUNG, AND VINCENT C. SCHOEMEHL AS MEMBERS OF THE BOARD OF POLICE COMMISSIONERS FOR THE CITY OF ST. LOUIS AND LAWRENCE J. KING

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10 pp

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
STATEMENT OF THE CASE	2
REASONS WHY THE PETITION SHOULD BE DENIED	3
I. The Holding of the Eighth Circuit Does Not Conflict With Applicable Decisions of This Court	3
II. There is No Conflict Between the Circuits that Provides a Basis for Granting the Writ	5
CONCLUSION	7

TABLE OF AUTHORITIES

Page(s)

Cases:

Anderson v. Creighton, 483 U.S. 635, 107 S.Ct. 3034, 97 L.Ed.2d 523 (1987) 4

Daugherty v. Campbell, 935 F.2d 780 (6th Cir. 1991) . 5

DeShaney v. Winnebago County Department of Social Services, 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989) 3

Gregory v. City of Rogers, 974 F.2d 1006 (8th Cir. 1992) (en banc), *cert. denied* __ U.S. __, 113 S.Ct. 1265, 122 L.Ed.2d 661 (1993) 3

Wells v. Walker, 952 F.2d 368 (8th Cir. 1988) *cert. denied* 489 U.S. 1012, 109 S.Ct. 1121, 103 L.Ed.2d 184 (1989) 4

White v. Rockford, 592 F.2d 381 (7th Cir. 1979) 3

Wood v. Ostrander, 851 F.2d 1212 (9th Cir. 1988), modified on rehearing, 879 F.2d 583 (9th Cir. 1989) *cert. denied* 498 U.S. 938, 111 S.Ct. 341, 112 L.Ed.2d 305 (1990) 3

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Respondents Robert J. Baer, John J. Frank, James E. Mosbacher, William E. Young, as Members of the Board of Police Commissioners for the City of St. Louis, and Vincent C.

Schoemehl, in his ex officio capacity, and Lawrence J. King respectfully request that this Court deny the petition for writ of certiorari seeking review of the Eighth Circuit's decision in this case. That decision is reported at 28 F.3d 895 (8th Cir. 1994).

STATEMENT OF THE CASE

Respondents herein incorporate by reference the statement of facts in the opinion below (Pet. App. p. 4-6) which is fair and evenhanded.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE HOLDING OF THE EIGHTH CIRCUIT DOES NOT CONFLICT WITH APPLICABLE DECISIONS OF THIS COURT.

The decision of the Eighth Circuit is based upon two holdings. First, that no constitutional violation existed. Secondly, and primarily, that the Respondents were entitled to qualified immunity.

a. *Substantive Due Process*

With respect to the existence of any constitutional violation, the Eighth Circuit applied the principles of *DeShaney v. Winnebago County Department of Social Services,* 489 U.S. 189, 109 S.Ct. 998, 103 L.Ed.2d 249 (1989). This Court in *DeShaney* established in 1989 the contours of the constitutional right of a person released from custody by the State. There is no duty to protect against private violence except in limited circumstances

Following *DeShaney,* the Eighth Circuit has found that constitutional rights may be implicated where a person is placed in greater danger than he was when taken into custody. *Sellers* opinion App. 7, 10, citing *Gregory v. City of Rogers,* 974 F.2d 1006 (8th Cir. 1992) (en banc), *cert denied,* __U.S.__, 113 S.Ct. 1265, 122 L.Ed.2d 661 (1993).

For purposes of this writ, what is significant is that *Sellers* applies not only the holding in *DeShaney* but also recognizes those pre-*DeShaney* decisions from other circuits that held that deprivations of substantive due process based on police officers' decisions to leave vulnerable individuals in clearly dangerous circumstances. See App. 16 citing *Wood v. Ostrander,* 879 F.2d 583 (9th Cir. 1989) *cert. denied,* 498 U.S. 938, 111 S.Ct. 341, 112 L.Ed.2d 305 (1990); *White v. Rockford,* 592 F.2d 381 (7th Cir. 1979). The decisions are cited and relied upon by the Petitioners.

In the application of *DeShaney* based upon the record before it, which contained extensive discovery, the court here did not conclude that a constitutional violation existed. This was based on the fact that the decedent, an adult male, was released "near a police station at approximately 9:00 p.m. on a midsummer evening, where he could have called for a ride." App. p. 13. The view of the record was that a reasonable fact-finder could not conclude that the officers intentionally, wilfully, or recklessly placed decedent in a position of greater harm than when they removed him from a fairground. App. p. 21.

b. *Qualified Immunity*

The primary basis for the *Sellers* decision is the Respondents' entitlement to qualified immunity. This was based on two grounds. First, in this fact-intensive record, it was concluded that the conduct of the law enforcement officers met the test of "objective reasonableness." In viewing the Respondents' conduct, it was held that reasonable officers would not have known that decedent's constitutional rights were being violated by removing him from a fairground of 600,000 people because of his obnoxious conduct and releasing him near a police station approximately 10 blocks away in an intoxicated state and without funds. This was rather than retain custody and charge him with disorderly conduct. App. p. 12.

In addition, the principles regarding constitutional rights in custodial situations were not "clearly established" in 1986 in the Eighth Circuit at the time of the incident. As *Sellers* points out in footnote 6, it was only in *Wells v. Walker,* 952 F.2d 368 (8th Cir. 1988) *cert. denied* 489 U.S. 1012, 109 S.Ct. 1121, 103 L.Ed.2d 184 (1989) that for the first time a possible due process violation for releasing from custody was recognized. App. p. 14. The actions of the officers must be judged at the time they occurred as to the existence of constitutional rights. *Anderson v. Creighton,* 483 U.S. 635, 636-37, 107 S.Ct. 3034, 3036, 97

L.Ed.2d 523 (1987). The Petitioners' reliance upon the earlier Seventh Circuit decision of *White v. Rockford,* 592 F.2d 381 (7th Cir. 1979) as establishing the constitutional right in the Eighth Circuit is misplaced. The inquiry as to whether a constitutional right is clearly established extends first to decisions of the Supreme Court, then to decisions of the circuit, and only then to decisions of others circuits. *Daugherty v. Campbell,* 935 F.2d 780, 784 (6th Cir. 1991).

Petitioners' reliance upon *Wood v. Ostrander,* 851 F.2d 1212 (9th Cir. 1988) is likewise misplaced. Pet. 20. First, it is misplaced because although petitioners do not tell the Court that the opinion was modified on rehearing, it was, *Wood v. Ostrander, supra,* 879 F.2d 583 (9th Cir. 1989). Second the Ninth Circuit finding that the law in 1984 in that circuit regarding the stranding of a person as a violation of due process was clearly established does not establish it as so in the Eighth Circuit. Significantly, *Wood* was not decided until two years after the occurrence in *Sellers.*

II. THERE IS NO CONFLICT BETWEEN THE CIRCUITS THAT PROVIDES A BASIS FOR GRANTING THE WRIT.

The petition appears to be based upon an alleged conflict within the Eighth Circuit. This is based upon petitioners' reading of *Gregory.* Petition p. 27.

As *Sellers* indicates, *Gregory* did not deal with the question of qualified immunity. If such a conflict exists, this should be resolved by that court en banc. Regardless, a conflict within a circuit does not provide a basis for granting a writ of certiorari by this Court.

The two decisions cited from the Seventh and Ninth Circuits likewise did not deal with qualified immunity. Also, they were both pre-*DeShaney.* If a conflict were to exist, it would only be

after decisions have been rendered interpreting *DeShaney.* The Eighth Circuit in *Sellers,* as previously stated, applied the principles in that decision. No decision from another circuit has been cited by petitioner where a conflicting interpretation has been rendered.

The real complaint of petitions is to the underlying factual basis for the granting of the summary judgment. Petitioners inappropriately request this Court to consider the record and evidence before the Eighth Circuit. Petitioner "prays that this honorable court consider the evidence to which the Eighth Circuit held a blind eye so that justice may prevail . . . the location of release is an extremely important aspect of this case in determining the level of culpability of the officers. The record clearly supports reasonable differences of opinion. . ." Petition p. 31. It is also stated therein that "failure of the Eighth Circuit to consider the factual matters properly before it runs afoul of this Court mandate in *Celotex Corporation v. Catrett*" (cite omitted) Petition p. 31.

Respondents strongly suggest that such an argument necessitates denial of the writ. Petitioners seek to have this Court reexamine the facts in the record. This Honorable Court ought not to provide super appellate review. This was a fact intensive case where the Eighth Circuit applied the standard of "objective reasonableness" to conclude that respondents had official immunity. The function of reviewing the record in this cause is not the kind that this Court's resources ought to be expended upon.

CONCLUSION

For these reasons, the petition for writ of certiorari should be denied.

Respectfully submitted,

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